No. 15865

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

WILLIAM CECIL POOL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**Upon Appeal From the United States District Court for the District of Nevada.**

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## BRIEF OF APPELLANT.

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## TOPICAL INDEX

# TABLE OF AUTHORITIES CITED

PAGE



COURT RULES



STATUTES



TEXTBOOKS

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### Statement of Jurisdiction.

The appellant, William Cecil Pool, was indicted in two counts under 18 U. S. C. 242 [R. 3-6]. Appellant entered a plea of not guilty [R. 304]. Appellant was found guilty by the jury verdict rendered on October 17, 1957 [R. 307]. Appellant filed a motion for a new trial [R. 308-309] which the trial court denied [R. 310]. Judgment, sentence and commitment were entered by the trial court on November 1, 1957 [R. 309-310].

Appeal from this final judgment to this Court is pursuant to 28 U. S. C. 1291 and 18 U. S. C. 3772. Appellant filed notice of appeal on November 18, 1957 [R. 35-36] pursuant to Federal Rules of Criminal Procedure, Rule 39, and the rules of this court.

## Statement of the Case.

The appellant, during the period he was chief of police of the City of North Las Vegas, Nevada, was the target of political dissention in Clark County, Nevada, which resulted in the filing of a recall petition and the investigation by the Clark County grand jury of the police department of North Las Vegas [R. 269]. Among the matter investigated by the grand jury was the alleged beating of two prisoners held in the custody of the North Las Vegas police department in February 1956 [R. 258]. No indictment was returned by the Clark County grand jury [R. 271].

Seven months later the appellant was charged with a violation of Section 242 of Title 18, United States Code, as a result of the alleged beating of prisoner Coite M. Gaither, Jr., during the morning of February 27, 1956, and the alleged beating of prisoner Ray L. Sage, Jr., during that afternoon while each of them was in the custody of the North Las Vegas police department [R. 3-6, 41].

### A. The Original Facts Presented to the Clark County Grand Jury.

On the morning of February 27, 1956 two burglary suspects were arrested and brought to the North Las Vegas police department [R. 130-131]. Within forty-eight (48) hours both suspects signed written confessions to the crime of burglary [R. 230]. Both stated in the trial below that they were guilty of the felony for which they had been convicted [R. 108, 147-148]. The disposition of each case was one to fifteen years in the Nevada State Prison [R. 50, 91, 148]. Their sentences were commuted after serving ten months [R. 110, 148].

One suspect, Coite M. Gaither, Jr., asserted his innocence throughout the police investigation, until an accomplice of Gaither gave the police a sack with the stolen money in it and signed a statement implicating Gaither in the crime [R. 228, 142]. Only then did Gaither admit that he had stolen slot machines from three different markets in North Las Vegas [R. 143, 228], although he refused to admit to other burglaries about which he was then questioned [R. 143].

The other suspect, Ray L. Sage, Jr., also denied the crime until he was presented with a statement signed by an accomplice [R. 73]. Then he also admitted the same three burglaries [R. 87].

Both Sage and Gaither were booked in the Clark County jail on February 29, 1956, at the time they pleaded guilty [R. 223]. On March 1, 1956, a report was received by the Sheriff's department of Clark County that two men in the County jail was injured [R. 221]. The Sheriff's representative took pictures of Sage, although no pictures were taken of Gaither and no physician was called [R. 222-223].

Thereafter, the Clark County grand jury investigated the case as part of its consideration of the petition to recall the North Las Vegas police [R. 269, 271].

It appears that one witness before the grand jury was Victor L. Carlson, then a member of the North Las Vegas police department [R. 164]. Carlson, several days before he knew of the grand jury investigation, had signed a statement dated February 27, 1956 which said that earlier that day he and a fellow officer, Captain Clifton, were driving prisoner Sage to the Henderson, Nevada, city jail, that Sage had attempted to jump out of

the speeding car and had thus been injured [Deft. Ex. C, R. 198].[1] On March 3, 1956 he signed a similar statement [Deft. Ex. D, R. 199].[2] Ultimately, Carlson testified to the same facts before the Clark County grand jury [R. 197].

### B. The Reversal of Testimony by Witness Victor L. Carlson.

On April 25, 1956 Victor L. Carlson was discharged from the North Las Vegas police department [R. 199].[3] The appellant was still the chief of police.

Carlson appeared as a prosecution witness in the trial below and testified as an accomplice of the appellant in the alleged beatings of the two prisoners. He repudiated (1) his written statement of February 27, 1956, (2) his statement of March 3, 1956, and (3) his testimony before the Clark County grand jury.

He first offered to explain that his February 27, 1956 statement was made on direction of the appellant "to get the heat off of us from the County grand jury" [R. 198]. He then admitted that his statement preceded by one or two days his learning that there was going to be heat from the County grand jury [R. 198]. He then offered another explanation, namely, that the statement was "a

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[1]The North Las Vegas police station had no jail, and as a result prisoners were confined in the city jail of nearby Henderson or Las Vegas [R. 182].

[2]Defendant's Exhibits C and D were statements introduced to impeach prosecution witness Carlson.

Assuming *arguendo* that prisoner Sage was truly beaten on his trip to Henderson, the Carlson statement at least showed that Carlson and Clifton, *and not the appellant,* were present on the trip.

[3]The record does not disclose the extent to which his discharge led Carlson to make a complete reversal in his sworn testimony.

cover-up . . . in case anything came up" as a result of a statement to Dr. French at the city jail in Henderson [R. 198].

His grand jury testimony allegedly stemmed from threats made to him by the appellant [R. 190, 197].[4] He said that he and Clifton drove to the spot where prisoner Sage had been beaten and burned certain evidence [R. 192-193]. He added that in a police car trip to Baker, California, the appellant ordered Captain Clifton to stay out of Las Vegas and he discussed his grand jury testimony [R. 189-190].

**C. The Testimony of the Witnesses Other Than the Alleged Accomplice Carlson and the Two Convicted Felons.**

Dr. J. B. French, the physician who examined the wounds of prisoner Sage when he was in the Henderson, Nevada, jail on the night of February 27, 1956, replied to a prosecution request for an opinion as to the nature of the wounds and its cause [R. 80]:

> "No, I do not believe I could answer that question honestly."

Billy Richards Leeds, a former officer of the North Las Vegas police department, said that on February 27, 1956 he saw prisoner Sage at the police station from 9:00 A. M. until 3:00 P. M. and observed no physical

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[4]The reason is not clear from the record why, if Carlson's cooperation was essential to protect the appellant, Carlson was discharged from the police force on April 25, 1956, six months before the termination of the appellant as chief of police.

The record fails to show the presence of the appellant at the time of the delivery of Sage to the Henderson jail, the picking up of Sage at the Henderson jail, or the alleged destruction of the evidence [R. 192].

mistreatment [R. 237]. At 3:00 P. M. he did see prisoner Sage leave the station, but it was with Captain Clifton and Officer Carlson [R. 239].[5]

Al Ferguson, the former police commissioner of the City of North Las Vegas, testified that during the evening of February 28, 1956 he saw Ray L. Sage, Jr. at a desk in the police station writing a statement, that no one dictated the statement, that Sage sat at a desk alone and that when Sage finished, the appellant asked Sage to open his shirt and show certain body bruises to the police commissioner [R. 225-227].

Witness Ferguson added that in the evening he and two other officers escorted Coite M. Gaither, Jr. from his place of confinement in the Las Vegas city jail to the police station in North Las Vegas, that an officer showed Gaither incriminating evidence and that Gaither then admitted the burglaries [R. 228]. He said that Gaither wrote his own statement and that no one dictated it [R. 229-230]. Later they went to dinner and Gaither refused to eat, because Gaither said his stomach was upset because of too much drinking [R. 231].

Coite M. Gaither, Jr., one of the prisoners allegedly beaten, admitted that during the afternoon after the alleged beating he was confined for about six hours in the Las Vegas jail, he had complained to no one except to ask for pills to relieve his stomach ulcers, and he and Sage had been on a "three or four day drinking bat" [R. 141, 154]. Gaither never complained to Police Commissioner Ferguson of the alleged beating although he

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[5]Significantly, the appellant was not seen leaving with Sage when Sage was driven to the Henderson, Nevada jail, during which trip the beating allegedly occurred.

had the opportunity when Ferguson saw him that night [R. 231-232].[6]

Ray L. Sage, Jr., the other prisoner allegedly beaten during the trip, was left at the Henderson, Nevada, jail on February 27, 1956 in the afternoon [R. 70]. He was confined in the Henderson jail three hours before he asked a jailor to bring a physician and showed his bruises [R. 71]. Later that night at about 10:00 P. M. Dr. French examined him, and heard Sage assert he had been beaten by members of the North Las Vegas police department [R. 71, 77-78; Deft. Ex. A].[7]

The next night Sage wrote a statement at the North Las Vegas police department in his own words, which he admitted was not dictated to him [R. 101-102]. In the statement Sage exonerated the appellant [R. 102, Deft. Ex. B]. Sage testified he made his statement because the North Las Vegas police had promised they would use him as a State witness and not prosecute him for burglary [R. 91-92, 107-108].[8] However, he pleaded guilty, was sentenced to the Nevada State Prison, and

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[6]The first complaint by Gaither appears to have been after he had been sentenced to Nevada State Prison and was in the county jail.

[7]In Sage's statement to Dr. French, he said he did not know who the policemen were who allegedly beat him and at one point he said there were just two officers [Deft. Ex. A].

It may be argued that the story of the beating was fabricated by Sage to stay out of the custody of the North Las Vegas police at a time when he was still denying his guilt.

However, statements were clearly made that showed the presence of Carlson and Clifton, *but not the appellant,* on the trip to the Henderson jail.

[8]This was the statement which Police Commissioner Al Ferguson saw Sage write alone at the time Sage was asked by the appellant to open his shirt and show the bruises on his body to the commissioner.

not until he was in the Clark County jail did his body bruises come to the attention of the Sheriff [R. 109].

Ramona Wolf, a prosecution witness, on February 27, 1956 was typist and secretary to the appellant. On that day she was also the wife of the appellant, although they were divorced in April 1956 [R. 208-209]. She testified that she first saw the appellant interrogating Gaither; that the appellant then called her to his desk and dictated a statement; that after she transcribed the statement Gaither signed it, that thereafter she heard the appellant command Gaither to take a ride and they left; that after an hour the appellant and Gaither returned and Gaither's face appeared flushed and red [R. 211-213].[9] She also testified that some time during the same day, she saw Sage go to a police car outside the station with the appellant, Captain Clifton and Officer Carlson [R. 214].

**D. The Principal Evidence Presented by the Prosecution.**

According to witnesses Gaither and Carlson, during the morning of February 27, 1956, the appellant and Carlson took Gaither by car to a dirt mound, the appellant struck Gaither in the face several times, the appellant told Carlson to strike Gaither, and Gaither fell down three times; but he denied committing the crime [R. 167-171, 160-162]. After thirty (30) minutes (according to Carlson) or an hour and a half (according to Gaither) they returned to the police station in North

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[9]It appears that witness Ramona Wolf was completely unreliable as a prosecution witness, because even Gaither and Carlson said that the appellant took Gaither for the ride the morning of February 27, 1956, that Gaither was in the Las Vegas jail for six hours until that evening when he signed a confession upon reading the incriminating evidence [R. 135-143]. Whether her testimony was motivated by her divorce from the appellant is speculative.

Las Vegas [R. 170-171, 162-163]. Thereafter, Gaither was taken to the Las Vegas city jail where he was confined. Six hours later that evening Gaither was returned to the North Las Vegas police station, presented with incriminating evidence, and he confessed to the burglaries [R. 167-168].

During that afternoon, according to witnesses Sage and Carlson, Sage was placed in a car by the appellant and Captain Clifton and Carlson and driven to an isolated spot [R. 172-174]. According to Carlson, the appellant told Sage to get out of the car, ordered Captain Clifton to work him over, Clifton beat Sage with a flashlight and the appellant kicked Sage [R. 172-173, 62-65]. Later Sage was confined in the Henderson, Nevada, jail [R. 69-70]. Sage signed a confession to the burglary the next day when he was presented with an incriminating confession of an accomplice [R. 87-88].

**E. The Questions Involved and the Manner in Which They Are Raised.**

The questions raised on this appeal fall into three general categories: (1) Errors in rulings on the admission and exclusion of evidence; (2) Errors in instructing the jury; (3) Whether the trial court allowed a prejudicial variance between the proof and the indictment; (4) Whether the trial court in its charge to the jury amended the indictment.

1. Rulings which had the effect of admitting incompetent and prejudicial evidence were as follows:

(a) The District Attorney of Clark County appearing as a witness was allowed to make a voluntary, gratuitous statement not in response to the question propounded, which prejudiced the appellant with the jury

[R. 271]. The trial court refused to grant the immediate motion by the appellant that the statement be stricken as improper opinion and prejudicial [R. 271-272]. The appellant cited the error in his motion for new trial [R. 288-290]; but the trial court denied the motion.

(b) The testimony of the appellant's wife (at the time, though later divorced) as to the manner in which appellant talked to a prisoner in her presence was admitted, although the prisoner was alleged to have been beaten by the appellant in the indictment. Appellant's objection on the ground that such communications were confidential and privileged was overruled by the trial court [R. 209-210]. The appellant cited the error in his motion for new trial [R. 297]; but the trial court denied the motion.

2. A ruling which had the effect of excluding admissible evidence was as follows:

Upon the appellant's cross-examination of a critical prosecution witness, Appellant offered a prior inconsistent statement for the purpose of impeachment [R. 200]. The trial court rejected the offer [R. 203]. At the conclusion of the trial, the trial court reversed its ruling and admitted the exhibit [R. 275]. In appellant's motion for a new trial, the prejudicial effect of delaying the appellant in introducing this exhibit was cited [R. 291-292]; but the trial court denied the motion for a new trial.

3. Appellant failed to except to the court's charge to the jury. However, appellant now contends that the trial court's charge failed to explain and define the offense with which the appellant was charged and that the error was sufficiently serious for the appellate court to notice the erroneous instructions under Rule 52(b), Federal Rules of Criminal Procedure.

4. The trial court permitted a material variance between the proof and the indictment which prejudiced substantial rights of the appellant. Appellant filed a motion for acquittal at the end of the Government's case [R. 224]. Appellant's trial counsel did not repeat the motion for acquittal at the end of the trial. However, the error was cited in appellant's motion for new trial [R. 282-288]; which was denied.

5. The trial court amended the indictment in its charge to the jury. Appellant cited the error in the motion for new trial [R. 282-288, 292-295]; which was denied.

## Specification of Errors.

1. The Court erred in refusing to grant the motion of appellant Pool to strike certain evidence and in refusing to instruct the jury to ignore such evidence, which motion was timely during the testimony of witness George Dickerson, District Attorney of Clark County, Nevada, who testified as follows:

> "Q. Mr. Dickerson, I believe you testified this morning that you had participated in part in the matter of presentation of this matter to the Clark County grand jury. What did you mean when you said in part? A. I was not present during any time when the evidence was submitted. I was present outside after the conclusion of the matter. Questions as to the legal problems involved, as to what crimes, if any, could be determined by the grand jury were asked of me, at which time I informed the grand jury that it was without jurisdiction to entertain any action in this regard, in that the evidence adduced constituted at the most a misdemeanor offense; that the grand jury is an arm of the dis-

trict court and can return an indictment only on matters tried with the district court.

Mr. Watson: I think Mr. Dickerson's legal opinion in the matter of the State law of Nevada in the matter of the grand jury is not proper at all, as being prejudicial and should be stricken.

The Court: Let me make this very obvious observation. Counsel are not permitted to sit idly by and allow inadmissible matter to go into the record and thereafter gamble on the chance of it being favorable or unfavorable and moving to strike. They are required to make objections to questions asked. Now this Court was aware of it as soon as that question was asked, but you didn't see fit to make the objection.

Objection overruled" [R. 271-272].

2. The Court erred in instructing the jury in that the instructions as a whole failed to state that the charges against appellant Pool was the obtaining from a prisoner a confession, statement or information by force and violence with the specific intent to deprive the prisoner of that specified Federal constitutional right and therefore the Court omitted an essential ingredient of the offense charged [R. 6-21].

3. The Court erred in instructing the jury in the following manner:

"If you find from the evidence in this case that the defendants took Sage and Gaither into custody under color of law by reason of the positions they held, then the court charges you that Sage and Gaither had the right to be tried upon any charge for which they have been arrested, in a regularly constituted court of justice having jurisdiction and if found guilty subjected to the usual pain and penal-

ties applicable to all persons alike for the offense charged, but not to be subjected to unusual punishment or to be tried by ordeal by the defendants. Those were their constitutional rights and privileges under the Federal Constitution" [R. 13].

4. The Court erred in instructing the jury in the following manner:

"But, as I said before, if Sage and Gaither were taken into custody by the defendant, under color of law, by reason of the positions held by the defendants, then the ordeal to which the defendant, Pool, subjected both Sage and Gaither and the ordeal to which the defendant, Clifton, subjected Sage at a point near Nellis Air Force Base constituted a violation of the Federal statute" [R. 14].

5. The Court erred in instructing the jury in the following manner:

"In order to convict defendants Pool and Clifton under Count I it is necessary for the jury to find that the defendants had in mind the specific purpose of depriving Sage of a Constitutional right—that is to deprive him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed; and in order to convict Pool under Count II it is necessary for the jury to find that the defendant had in mind the specific purpose of depriving him of the right to be tried by a court, to be tried in an orderly way and to receive, if found guilty, the usual pains and punishment for any offense he may have committed" [R. 16].

6. The Court erred in instructing the jury in the following manner:

> "If you find the acts alleged in the indictment to have been committed, then let me summarize the questions you have to determine:
>
> As to Count I,
>
> (1) Did defendants Pool and Clifton take Sage into custody under color of law?
>
> (2) Did defendants Pool and Clifton specifically intend to deprive Sage of a constitutional right guaranteed to him by the United States Constitution?
>
> (3) Has the government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?
>
> If the government has done so it is your duty to find the defendants guilty in this case. If you have a reasonable doubt upon either of the two essentials, it is your duty to acquit the defendants.
>
> As to Count II,
>
> (1) Did defendant Pool take Gaither into custody under color of law, and
>
> (2) Did defendant Pool specifically intend to deprive Gaither of the constitutional right guaranteed to him by the United States Constitution?
>
> (3) Has the Government established these two foregoing essentials to your satisfaction beyond a reasonable doubt?
>
> If the Government has done so it is your duty to find the defendant guilty in this case. If you have a reasonable doubt upon either of these two essentials, it is your duty to acquit the defendants" [R. 18-19].

7. The Court erred in refusing to grant the appellant Pool's motion for a new trial which motion was based

upon a material variance between the evidence and the indictment, in that, assuming *arguendo* the evidence is construed favorably to the plaintiff it shows that (a) in the case of prisoner Gaither after his alleged beating he denied any knowledge of a crime, thereafter for about five and one-half hours he admitted nothing while in jail, thereafter he was shown a sack full of change and pieces of paper which he read, then he offered to confess to certain burglaries and not to any other burglaries, and (b) in the case of prisoner Sage after his alleged beating he admitted nothing, thereafter he was in jail overnight and admitted nothing, and on the next day after he was shown the confession of prisoner Gaither he offered to confess to the same burglaries as Gaither did, and the indictment included as one of the elements of the offense that appellant Pool had deprived each of the prisoners of a Federal constitutional right by obtaining a confession, statement or information by force and violence with the specific intent to deprive each of the said prisoners of the specified constitutional right, and that the said variance was prejudicial to substantial rights of appellant Pool [R. 282-288].

8. The Court erred in excluding from evidence during the cross-examination of witness Victor L. Carlson appellant Pool's Exhibit C, which was offered by appellant Pool during the cross-examination of witness Victor L. Carlson for the purpose of impeachment, said Exhibit C comprising an inconsistent statement identified as having been signed by witness Victor L. Carlson [R. 200, 203, 275].

9. The Court erred in admitting into evidence over the objection of appellant Pool to testimony of witness Ramona Wolf and in overruling said objection, since the testimony related to the interrogation of prisoner Gaither by appellant Pool in front of witness Ramona Wolf, and the objection made was that witness Ramona Wolf was the wife of appellant Pool at the time of the said occurrence, that the communications were made to her in confidence as the wife of appellant Pool, and that such confidential communications could not be disclosed over the objection of appellant Pool [R. 209-210].

10. The Court erred in refusing to grant the appellant Pool's motion for a new trial which motion was based upon the failure of the evidence to support the verdict, in that, *arguendo,* assuming the evidence is construed favorably to the plaintiff it shows that (a) in the case of prisoner Gaither after his alleged beating he denied any knowledge of a crime, thereafter for about five and one-half hours he admitted nothing while in jail, thereafter he was shown a sack full of change and pieces of paper which he read, then he offered to confess to certain burglaries and not to any other burglaries, and (b) in the case of prisoner Sage after his alleged beating he admitted nothing, thereafter he was in jail overnight and admitted nothing, and on the next day after he was shown the confession of prisoner Gaither he offered to confess to the same burglaries as Gaither did, and the indictment required the plaintiff to prove beyond a reasonable doubt that the deprivation of a Federal consti-

tutional right which appellant Pool committed was obtaining from each prisoner a confession, statement or information by force and violence with the specific intent to deprive each of the said prisoners of the specified Federal constitutional right [R. 282-288, 292-295].

11. The trial court erred in denying appellant's motion for a new trial [R. 280-299].

## Summary of the Argument.

> "From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing into presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (*Bollenbach v. United States,* 326 U. S. 607 (Frankfurter, *J.*).)

1. The District Attorney of Clark County, testifying as a witness to produce a document and to lay a foundation for its introduction, added a voluntary and gratuitous statement which was not admissible as evidence, was not responsive to the question propounded, and prejudiced the appellant. The appellant's motion to strike the statement as improper and prejudicial opinion was overruled. The

failure of the trial court to sustain the objection and instruct the jury to disregard the statement of the witness constitutes reversible error.

2. The trial court failed in the jury instructions to explain and define the offense with which the appellant was charged. The evidence construed favorably to the prosecution showed only that prisoners were beaten, not that confessions were procured by force and violence. The indictment specified among the Constitutional deprivations suffered by the prisoners the procurement of confessions by force and violence. The jury charge as a whole was confusing and inadequate as to which Constitutional right the jury must find the prisoners were deprived of with the requisite specific intent. The error was sufficiently serious to allow the appellate court to reverse despite appellant's failure to take exception to the charge.

3. The evidence construed favorably to the prosecution materially varied from the indictment. The evidence did not show that confessions were procured by force and violence. Nevertheless, this was alleged in the indictment. The appellant was led to believe that the charge could be refuted by a witness to the signing of the confessions to show that the acts were voluntary. The prosecution relied on a beating to prove its case, despite the absence of a causal relation between the beating and the signing of the confessions. Therefore, appellant did not have sufficient time to seek an alibi witness to show where he was at the time of the beating.

4. During the cross-examination of a critical prosecution witness, the appellant endeavored to impeach him by introducing a prior inconsistent statement. The trial court excluded the statement. At the end of the trial the statement was admitted. The delay imposed on the appellant in impeaching the prosecution witness was an abuse of the trial court's discretion and constitutes reversible error.

5. The trial court overruled the appellant's objection and allowed appellant's wife (since then divorced) to testify to the manner in which the appellant talked to a prisoner in her presence; which appellant contends was a confidential communication and privileged. The denial of appellant's objection was reversible error.

6. The prosecution's own evidence failed to show that confessions were procured by appellant by force and violence. The indictment included this element as one of the material Constitutional deprivations to which the appellant subjected his prisoners. The trial court ignored this element of the indictment and omitted it from the charge to the jury. The trial court amended the indictment.

## ARGUMENT.

### I.

### The Trial Court Committed Reversible Error in Refusing to Strike the Prejudicial Testimony by the Clark County District Attorney Regarding the Evidence Before the Grand Jury.

#### A. The Testimony of the Clark County District Attorney and the Circumstances Under Which It Was Given.

The appellant endeavored to impeach one prosecution witness, Ray L. Sage, Jr., by introducing into evidence a copy of a prior inconsistent statement which had been signed by Sage [R. 99]. The Court withheld ruling on the offer of the statement to give the appellant's counsel an opportunity to make a further attempt to produce the original record [R. 100-101]. The District Attorney of Clark County was subpoenaed by the appellant to produce the original statement [R. 258-259]. The document was produced and admitted into evidence [R. 270]. In laying the foundation for the requirement that he produce the document, the appellant's counsel asked the District Attorney whether he had occasion to advise the grand jury regarding an investigation of the North Las Vegas police department in the spring of 1956 with reference to the alleged beating of two prisoners held in custody of the North Las Vegas police department in February and March of 1956 [R. 257-258]. He answered: "In part, yes" [R. 258].

On cross-examination, the prosecutor asked the District Attorney to explain the testimony that he "had participated in part in the matter of presentation of this matter to the Clark County grand jury" [R. 271]. He answered that he was not present during any time when

the evidence was submitted, but that he did advise the grand jury as to which crimes were under its jurisdiction [R. 271]. He then added, gratuitously [R. 271]:

> "I informed the grand jury that it was without jurisdiction to entertain any action in this regard, and that the evidence constituted at the most a misdemeanor offense."

This was practically the last testimony heard by the jury before the close of the trial [R. 275].

**B. The Prejudicial Effect of the Testimony of the Clark County District Attorney.**

The evidence of guilt in this case was not clear. The principal witnesses on behalf of the prosecution were two convicted felons and an admitted perjurer who had testified under oath to the complete opposite eighteen months before and had to repudiate two signed statements in order to testify for the prosecution in this case.

The District Attorney who made the statement was a person of standing and experience in the community, and his remarks naturally carried weight with the jury.

The evidence was highly prejudicial to the appellant for two reasons:

(1) The jury might have inferred from the testimony that the failure of the Clark County grand jury of 1956 to return an indictment stemmed from its reliance on the advice of the District Attorney, rather than a refusal to conclude that a crime had been committed. Either conclusion would have been speculative, but it was certainly prejudicial to intimate that one reason was a stronger motivation than another.

(2) The jury might have inferred that the District Attorney had evaluated the evidence presented to the Clark County grand jury of 1956 as sufficient to show the commission of a crime (a misdemeanor), under the penal laws of Nevada.

The statement of the District Attorney was an expression of opinion which was not admissible as evidence. It was not responsive to the question propounded, which merely sought an explanation of the extent to which he "participated in part" in the presentation to the grand jury. The District Attorney was experienced in a court procedure. The statement was made in response to questioning by a fellow prosecutor. The inescapable conclusion is that the statement of the District Attorney was designed and calculated to influence the jury to the prejudice of the appellant, and should therefore justify a reversal of the conviction.

### C. The Refusal of the Trial Court to Strike the Statement of the District Attorney.

As soon as the District Attorney made the statement, the appellant's counsel asked that it be stricken as improper opinion and prejudicial [R. 271]. The trial court refused to sustain the objection on the ground that the inadmissibility of the evidence was revealed by the question itself [R. 271-272]. The failure of the trial court to remove the damaging statement from the consideration of the jury was clearly reversible error.

In *Nalls v. United States* (5th Cir., 1957), 240 F. 2d 707, the defendant was convicted for knowingly and willfully acquiring marihuana without having paid the transfer tax imposed by law. On appeal from his conviction, a new trial was granted although the trial court

had stricken a voluntary statement of a police officer, because of the prejudice which must of necessity stem from such testimony. The Court stated on page 710 of 240 F. 2d:

> "An unresponsive statement was volunteered by City Policeman Scott for which the Government was not responsible. When asked what he did when he first saw defendant, the officer replied: 'Our Department carried a pick-up on him on a warrant held by the sheriff's office.' The Court, upon objection and request stated: 'I believe at this stage of the proceeding I will sustain the objection and instruct the jury not to consider that remark.' A mistrial was promptly asked and refused. *We think that this statement was calculated to influence the thinking of the jury and was likely to induce prejudice.* . . ." (Emphasis supplied.)

In *Lott v. United States* (5th Cir., 1955), 218 F. 2d 675, 680, a new trial was granted to the accused because of error which resulted from a volunteered statement by a police officer that "we knew one of these defendants was pushing dope" out of his apartment in a prosecution for a conspiracy to violate the narcotics laws.

In *Helton v. United States* (5th Cir., 1955), 221 F. 2d 338, 340, it was held that reversible error resulted from a volunteered statement of an officer in a prosecution for the illegal acquisition and production of marihuana that the defendant had told the officer "that he had been smoking marihuana intermittently very seldom for past four or five years."

In *State v. Cooper* (S. Ct. of La., 1953), 66 So. 2d 336, a manslaughter prosecution arising out of a shooting, the defendant pleaded self-defense and contended that

deceased had procured a weapon from his automobile and was advancing on defendant to carry out a threat to kill. The appeal arose from a certain unsolicited opinion given by the coroner, while he was testifying for the State at the inception of the trial. After stating that he had visited the scene of the crime on the day of the shooting, the coroner was asked:

> "Q. Will you please tell the jury what you know about that? A. I was called to the house and found a man lying on the ground with—he had fallen out of the door of his car, on the driver's side of the car."

Defense counsel objected to the statement as an expression of the witness' own deduction, drawn from the position in which he had seen the body; and the trial court overruled the objection.

The appellate court in *State v. Cooper, supra,* 66 So. 2d at 337-338, stated:

> "Of course, the doctor was an expert and it was permissible for him to express an opinion on medical matters concerning which he had special knowledge by reason of his training and experience. But, in voicing his impression or opinion that a man had fallen out of the door of his automobile, when he had not been a witness to the occurrence, he was not giving expert testimony. Manifestly, he was no better qualified to draw such a conclusion than any lay witness.
>
> "That this evidence was highly prejudicial to appellant is also not a matter of doubt. He had pleaded self-defense and was contending that the deceased

had procured a weapon from the car and was advancing upon him to carry out a threat to kill, made only a few seconds prior to the firing of the fatal shot. The State, on the other hand, was maintaining that the deceased had been shot while sitting in his car. Thus, the inadmissible unsolicited opinion of the Coroner was in direct support of the theory of the prosecution.

"In his *per curiam* to this bill of exceptions, the judge states:

> 'The court immediately upon overruling objection of Counsel instructed the witness to testify as to only what he saw and specifically instructed the "jury" immediately as to the law.'

"The action taken by the judge did not repair the damage. The overruling of the objection can only be regarded as an approval of the witness' statement to the jury. This error was not cured by the instruction to the witness to testify only as to things observed by him. Indeed, this instruction may have created in the minds of the jury an impression not intended by the judge—that is, that the witness should testify only to things he had seen and that everything that he had previously said was perfectly appropriate and should be considered because counsel's objection was not well taken.

"Nor do we think that the instruction which the judge gave the jury, immediately after counsel had reserved this bill of exceptions, remedied his error in permitting the statement of the witness to stand. That instruction was merely that the jury should take the case and try it solely on the evidence it heard and that it was to disregard any statement by either the court or counsel 'which is contrary to

> the evidence which you hear from the witness chair.' This does not inform the jury that it should not consider the objectionable opinion of the Coroner, rather, it suggests that the jurymen should scrutinize all the evidence heard from the witness chair and were to disregard the contrary statements of the court and counsel.
>
> "The proper procedure for the judge was to have sustained the objection and instructed the jury to disregard the statement of the witness. State v. Martin, 193 La. 1036, 192 So. 694. Since we find that the reception of this illegal evidence was prejudicial to the substantial rights of appellant, he is entitled to a new trial."

Annotation, 8 A. L. R. 2d 1013 ff., contains a comprehensive review of the cases on the "Effect of voluntary statements damaging to accused, not proper subject of testimony, uttered by testifying police or peace officer." The Annotation, on pages 1015-1016 of 8 A. L. R. 2d, sets forth the factors which have led appellate courts to hold that the error involved in such improper voluntary statements was, under the circumstances, either alone or in conjunction with other errors, prejudicial and reversible:

> "(1) the erroneous statement, alone or considered along with other errors occurring in the trial, led to the conclusion that accused did not have the fair and impartial trial guaranteed by law (and such result has obtained even in a case where the reviewing court stated that there was clear evidence of guilt); (2) the erroneous statement probably did cause, or might have caused, the jury to convict; (3) notwithstanding action which may have been

taken by the trial court, if any, to cure the error, the reviewing court concluded, under the circumstances, that the damage to accused could not be eradicated from the minds of the jury; (4) the case was a close one, with the evidence of guilt not entirely clear—especially in cases where the state's case was based on circumstantial evidence; (5) the penalty or sentence assessed by the jury or by the trial court was severe and heavy; (6) the police or peace officer making the statement, such as a sheriff or other well-known officer, was a person of standing, experience, etc., in the community, so his remarks would carry weight with the jury; (7) the officer making the statement was an experienced and trained officer familiar with court procedure; (8) no effort was made, nor action taken, by the trial court to cure the error or to remove the improper and damaging statement from the record or from the consideration of the jury; and (9) the improper voluntary statements were not only made, but were repeated."

Certainly the factors present in this case meet all the standards recognized for finding prejudicial and reversible error.

## II.

## The Trial Court Failed in the Jury Instructions to Explain and Define the Offense With Which the Appellant Was Charged.

### A. The Court of Appeals Has the Authority to Notice Erroneous Instructions Despite a Failure to Object.

Rule 52(b), Federal Rules of Criminal Procedure, states:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

This is an exception to Rule 30, Federal Rules of Criminal Procedure, which provides *inter alia:*

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matters to which he objects and the grounds of his objections."

In *Herzog v. United States* (9th Cir., 1956), 235 F. 2d 664, the United States Court of Appeals held on rehearing, reversing an earlier stand (226 F. 2d 561), that it had the authority to consider error in instructions despite the failure of counsel to object at the trial. The Court held that it had the power under Rule 52(b) to determine whether in a given case to notice the error and disregard Rule 30. The Court further held that it must also determine whether the error "was of so serious a nature as to warrant the disregard of rule 30." (235 F. 2d at 667.) In the *Herzog* case, *supra,* the Court answered this question in the negative.

Another authority has also favored the liberal view that an appellate court should consider the error if it

affects substantial rights. (Hughes, *Federal Courts: Appellate Court Authority to Notice Erroneous Instructions Despite Failure to Object,* 45 Cal. L. Rev. 382 (1957).)

It is respectfully submitted that the errors cited herein justify consideration by the appellate court despite the failure to object. In *Screws v. United States,* 325 U. S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031, 162 A. L. R. 1330, a conviction under the Federal statute making it an offense to deprive, under color of any law, an inhabitant of a state of any rights, privileges or immunities granted him by the Federal Constitution was reversed by the United States Supreme Court. The defendants, local police officers, had arrested a citizen of Georgia and, in conveying him to the courthouse, had beaten him so severely as to cause his death. The Supreme Court construed the statute as requiring, as an element of the crime, a specific intent that the accused had the purpose to deprive the victim of a constitutional right, such as the right to trial by jury. The trial court had merely charged that defendants acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves from an alleged assault by their prisoner. After holding that the charge was insufficient, under the construction given the statute, the Court stated:

> ". . . It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. . . . But there are exceptions to that rule . . . And where the error is fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion.

> Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

It is respectfully submitted that in this case, substantial rights were prejudiced by the failure of the trial court to explain and define the offense charged. (*Morris v. United States* (9th Cir., 1946, 156 F. 2d 525, 169 A. L. R. 305.)

**B. The Proof of the Offense Construing the Evidence Favorably to the Prosecution.**

Construing the evidence in a manner favorable to the prosecution, we find that on the morning of February 27, 1956, the appellant beat prisoner Gaither and that in the afternoon he beat prisoner Sage. Neither beating resulted in a confession. By the testimony of the prisoners themselves, it was clear that the confessions were voluntarily given at a later time when incriminating statements signed by third-party accomplices were shown to the prisoners. Furthermore, the prisoners were not deprived of a fair trial on their day in court, when they subsequently pleaded guilty.

Therefore, the only Constitutional rights of which the prisoners could have been deprived under this state of the evidence were the right to be immune from illegal assault and battery by the appellant, the right not to be assaulted by the appellant and the right and privilege not to be subjected to illegal punishment without due process of law.

**C. The Constitutional Deprivations Stated in the Indictment.**

The indictment which sets forth the charge against the appellant specifies the following Constitutional rights of which the prisoners were deprived by the appellant:

(1) The right and privilege to be secure in their person while in the custody of the appellant;

(2) The right to be immune from the use of force and violence to obtain a confession, and

(3) The right to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accord with law, and

(4) The right not to be subjected to illegal punishment, force and violence by the appellant [R. 3-6].

**D. The Constitutional Deprivations Stated in the Jury Instructions.**

In considering the adequacy of the charge to the jury, it should be read as a whole and in its entirety. It is respectfully submitted that the instructions are confusing and inadequate on the question as to which Constitutional right the jury find the prisoners were deprived of with the requisite specific intent.

At one point the trial court stated that the deprivation was "the right to be tried upon any charge for which they had been arrested in a regularly constituted court of justice having jurisdiction and if found guilty subjected to the usual pain and penalties applicable to all persons alike for the offense" [R. 13].

The record, however, clearly shows that the prisoners did not give their confessions by force and violence and that their plea of guilty was voluntarily entered in a court of law.

Then, before discussing the issue of specific intent, the trial court stated:

> "If Sage and Gaither were taken into custody by the defendants, under color of law, by reason of the positions held by the defendants, *then the ordeal to which the defendant, Pool, subjected both Sage and Gaither*[10] . . . constituted a violation of the Federal statute" [R. 14; emphasis supplied].

Later in the charge to the jury, the trial court does discuss specific intent, but refers to the Constitutional right "to be tried by a court, to be tried in an orderly way and to receive, if found gulity, the usual pains and punishment for any offense he may have committed" [R. 6].

Finally, in the trial court's summary to the jury, only two elements were defined as requisite to a conviction: (1) whether the prisoners were in custody under color of law and (2) whether the appellant had a specific intent to deprive the prisoners of a Constitutional right [R. 18-19].

The summary totally omits the requirement that the prosecution prove beyond a reasonable doubt that the appellant actually deprived the prisoners of any Constitutional right and in addition fails to define that Constitutional right.

Throughout the charge there is confusion as to which Constitutional right the protection must prove the prisoners were deprived of. And at one point the trial court appears to have taken from the consideration of the jury

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[10]The trial court does not even treat this as a factual issue by inserting *"if you find* that the defendant Pool subjected Sage and Gaither to the ordeal . . .;" but appears to state to the jury that the appellant did subject the prisoners to the ordeal.

the question whether the appellant even mistreated the prisoners [R. 14].

Indeed, the instructions to the jury in this case appear to completely ignore the recognized principle that the offense of violating Section 242 of Title 18, United States Code, consists in *the fact of the* ". . . wilful deprivation under the color of state law of rights secured to prisoners by the Federal Constitution." (*United States v. Walker* (5th Cir.), 216 F. 2d 683, cert. denied, 348 U. S. 959, 75 S. Ct. 450, 99 L. Ed. 748.)

## III.

## The Trial Court Committed Reversible Error in Allowing a Variance Between the Proof and the Indictment Which Prejudiced Substantial Rights of the Appellant.

### A. The Proof of the Constitutional Deprivations Construing the Evidence Favorably to the Prosecution.

As previously explained in Argument II(B), *supra*, the evidence if construed in favor of the prosecution, *does not show* that confessions were obtained from the prisoners by force and violence (as alleged in the indictment) and *does not show* that the prisoners were deprived of their day in court when they pleaded guilty (as alleged in the indictment).

### B. The Variance Between the Proof and the Indictment Prejudices Substantial Rights of Appellant.

Assuming *arguendo* that the proof presented by the Government varied from the allegations of the indictment (which we will demonstrate hereinafter), the variance resulted in substantial prejudice.

Since the prisoners did not sign confessions until they were brought back to the police station in open view of

witnesses and since they wrote their confessions voluntarily, the appellant prepared his defense to the indictment by presenting a reliable witness who was present at the signing of the confessions [Witness Ferguson, R. 224-232]. This should have been sufficient to refute the charge in the indictment that the appellant procured confessions by force and violence, the indictment having specified a causal relation between the beating and the procurement of the confessions (as we will demonstrate hereinafter).

The evidence presented by the prosecution took the defense by surprise. The prisoners admitted that their confessions had been given voluntarily at the police station in North Las Vegas at night, but they testified that they had been beaten earlier in the day at a place miles from the police station, that the beatings did not result in confessions and that they had been confined and not mistreated for a substantial period of time before they returned to the police station and voluntarily signed their confessions. To refute this charge, the appellant should have had an opportunity to seek alibi evidence, such as witnesses who could place the appellant at a time where he could not possibly have committed the crime charged. The appellant had no chance to procure witnesses to explain his whereabouts at the time of the alleged beatings; and he was taken by surprise, because his evidence was directed to the time when the prisoners signed the confessions.

In *Berger v. United States* (1935), 295 U. S. 78, 82, 55 S. Ct. 629, 630, 79 L. Ed. 1314, the Supreme Court stated:

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has

been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, *so that he may be enabled to present his defense and not to be taken by surprise by the evidence offered at the trial;* and (2) that he may be protected against another prosecution for the same offense." See *Bennett v. United States,* 227 U. S. 333, 338, 33 S. Ct. 288, 57 L. Ed. 531; *Harrison v. United States* (6 Cir.), 200 Fed. 662, 673; *United States v. Wills* (3 Cir.), 36 F. 2d 855, 856-857. *Cf., Hagner v. United States,* 285 U. S. 427, 431-433, 52 S. Ct. 417, 76 L. Ed. 861. (Emphasis supplied.)

**C. The Indictment Led the Appellant to Expect Evidence That Confessions Were Procured by Force and Violence.**

In alleging in the indictment the deprivation of "the right and privilege to be immune from force and violence . . . for the purpose of obtaining a confession, statement or information about an alleged offense," the Government employed language which has been clearly interpreted by the Supreme Court of the United States. In *Williams v. United States,* 341 U. S. 97, 103, 71 S. Ct. 576, 95 L. Ed. 774, the indictment charged that the defendants had deprived designated persons of rights and privileges secured to them by the Fourteenth Amendment, to wit:

". . . the right and privilege not to be deprived of liberty without due process of law, the right and privilege to be secure in his person while in the custody of the State of Florida, the right and privilege not to be subjected to punishment without due process of law, the right and privilege to be immune, while

> in the custody of persons acting under color of the laws of the State of Florida, from illegal assault and battery by any person exercising the authority of said State, and the right and privilege to be tried by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Florida . . ."

The defendant in an appeal from his conviction contended that, because the deprivations defined in the indictment included "illegal assault and battery," the Civil Rights Act had been unconstitutionally applied to convict the defendant for a violation of the state law governing assault.

The United States Supreme Court, however, rejected this contention in the following language:

> "But the meaning of these rights in the context of the indictment was plain, viz. *immunity from the use of force and violence to obtain a confession.*"

This conclusion stemmed from the reading of the whole indictment, which supplemented the specified Constitutional rights of which the prisoners had been deprived by the following language:

> ". . . that is to say, on or about the 28th day of March, 1947, the defendants arrested and detained the said Frank J. Purnell, Jr., and brought and caused him to be brought to and into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co., at or near 3810 N. W. 17th Avenue, in said City of Miami, Florida, and did there detain the said Frank J. Purnell, Jr., and while he was so detained the defendants did then and there illegally strike, bruise, batter, beat, assault and torture the said Frank J. Purnell, Jr.,

in order illegally to coerce and force the said Frank J. Purnell, Jr., to make an admission and confession of his guilt in connection with the alleged theft of personal property, alleged to be the property of said Lindsley Lumber Co., and in order illegally to coerce and force the said Frank J. Purnell, Jr., to name and accuse other persons as participants in alleged thefts of personal property, alleged to be the property of said Lindsley Lumber Co., and for the purpose of imposing illegal summary punishment uopn the said Frank J. Purnell, Jr."

In short, the Supreme Court held that the charge was not for assault, but for a well recognized and classic deprivation of a Constitutional right. As stated by the Court on pages 101 to 102 of 341 U. S.:

"It is as plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause. This is the classic use of force to make a man testify against himself. The result is as plain as if the rack, the wheel, and the thumb screw-the ancient methods of securing evidence by torture (Brown v. Mississippi, 297 US 278, 285, 286, 80 L ed 682, 686, 687, 56 S. Ct 461; Chambers v. Florida, 309 US 227, 237, 84 L ed 716, 722, 60 S Ct 472)—were used to compel the confession. Some day the application of §20 to less obvious methods of coercion may be presented and doubts as to the adequacy of the standard of guilt may be presented. There may be a similar doubt when an officer is tried under §20 for beating a man to death. That was a doubt stirred in the Screws case; and it was the reason we held that the purpose must be plain, the deprivation of the constitutional right willful. But where police take

matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution. It is the right of the accused to be tried by a legally constituted court, not by a kangaroo court. Hence when officers wring confessions from the accused by force and violence, they violate some of the most fundamental, basic, and well established constitutional rights which every citizen enjoys. Petitioner and his associates acted willfully and purposely; their aim was precisely to deny the protection that the Constitution affords. It was an arrogant and brutal deprivation of rights which the Constitution specifically guarantees. Section 20 would be denied the high service for which it was designed if rights so palpably plain were denied its protection. Only casuistry could make vague and nebulous what our constitutional scheme makes so clear and specific."

It is significant to note the evidence which supported the conviction in *Williams v. United States, supra,* as summarized on pages 98 to 99 of 341 U. S.:

"Petitioner and others over a period of three days took four men to a paint shack on the company's premises and used brutal methods to obtain a confession from each of them. A rubber hose, a pistol, a blunt instrument, a sash cord and other implements were used in the project. One man was forced to look at a bright light for fifteen minutes; when he was blinded, he was repeatedly hit with a rubber hose and a sash cord and finally knocked to the floor. Another was knocked from a chair and hit in the stomach again and again. He was put back in the chair and the procedure was repeated. One was backed against the wall and jammed in the chest

with a club. Each was beaten, threatened, and unmercifully punished for several hours until he confessed."

A similar question arose in *Apodaca v. United States* (10th Cir., 1951), 188 F. 2d 932, 936, in which the Court stated:

> "The first count in the indictment in this case did not merely charge that the accused conspired to assault and torture Byrd. And the second count did not merely charge that they assaulted and tortured him. Each went further. The first count charged in language too clear for misunderstanding the formation of a conspiracy to deprive Byrd, under color or pretext of State authority, of rights, privileges and immunities guaranteed to him by the Fourteenth Amendment by assaulting and torturing him in the manner set forth for the purpose of forcing him to confess the commission of a criminal offense. And the second count charged in equally clear language the substantive offense of depriving Byrd, under color or pretext of State authority, of such rights, privileges, and immunities by assaulting and torturing him for such purpose. Each count in the indictment followed the statute in its generalities; each charged an offense under the laws of the United States; and neither is open to the attack directed against it."

In *Apodaca v. United States, supra,* the evidence showed that the accused for more than two hours applied, clamped and squeezed a bicycle type lock and another type lock around a prisoner's testicles, inflicting upon him serious pain and bodily harm and injury, for the purpose of forcing him to confess that he had committed a criminal offense.

Undoubtedly, in those cases where the Government alleged the extortion of a confession by force and violence as the deprivation of a Constitutional right, it undertook to prove such an act. By contrast, when the Government has merely relied on evidence that the accused assaulted a prisoner in his custody, the indictment has specified the deprivation of Constitutional rights in different language.

For example, in *United States v. Jackson* (8th Cir., 1956), 235 F. 2d 925, the Constitutional rights were specified as:

> "(1) the right not to be deprived of his liberty without due process of law; (2) the right and privilege to be secure in his person while in the custody of the State of Arkansas or an officer thereof; (3) the right and privilege to be immune from summary punishment by persons acting under color of the laws of Arkansas; and (4) the right and privilege not to be subject to punishment without due process of law."

In *United States v. Walker, supra,* the Constitutional rights were specified as:

> "(1) the right to be secure in his person, and to be immune from illegal assault and battery by the defendant and by other persons under the defendant's direction and control; and (2) the right not to be assaulted by the said defendant and by other persons under the defendant's control and direction; and (3) the right and privilege not to be subjected to punishment without due process of law."

In *United States v. Jones* (5th Cir.), 207 F. 2d 785, the Government pleaded two different counts in the in-

dictment. In the first count, there was included an allegation that the accused struck a prisoner to coerce information concerning alleged offenses. In the second count, this allegation was omitted. The Court added that the Government would be put to proof on

> ". . . all the material allegations in the information including the willful character of the acts of the defendant and his intention to deprive said prisoners of their civil rights under the constitution and laws of the United States." (207 F. 2d at 787.)

In sum, a line of demarcation exists between pleading an assault which wilfully deprives a prisoner of a Constitutional right and pleading the extortion of a confession, statement or information about an alleged offense by force and violence. Having elected to use language which is understood in a technical sense, the Government must conform its proof to the charge. (*United States v. Claflin* (1875), 25 Fed. Cas. No. 14, 789, 13 Blatchf. 178, on p. 436 of 25 Fed. Cas.)

There is sound reasoning to support such a line of demarcation. As recognized in *Williams v. United States, supra,* 341 U. S. at 101, where police beat a victim until he confesses, there is no doubt that the police have deprived the victim of a Constitutional right. The same conclusion does not readily follow from an assault on a prisoner. As stated in *Screws v. United States,* 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, there must first be a determination of all the circumstances attending the assault, including the malice of accused, the weapons used in the assault, its character and duration,

the provocation, if any, and the like, before it can be concluded that the accused had the purpose to deprive the prisoner of a Constitutional right, *e.g.,* the right to be tried by a court rather than by ordeal.

## IV.

## The Trial Court Abused Its Discretion in Excluding Appellant's Evidence to Impeach Witness Carlson During His Cross-Examination.

During the cross-examination of prosecution witness Carlson the appellant attempted to introduce Defendant's Exhibit C, a statement dated February 27, 1956, which appeared to impeach witness Carlson [R. 200-203]. The trial court rejected the offer [R. 203].

Although no further foundation was laid, the trial court reversed the ruling and admitted the statement at the end of the case [R. 274-275].

The time for admitting such an impeaching statement is within the discretion of the trial court. However, in this case Carlson was a critical prosecution witness, in fact, the only effective witness other than the two convicted felons. He was also an admitted perjurer who had stated he swore falsely to the Clark County grand jury. Under these circumstances the trial court should have exercised its discretion in favor of the appellant and permitted the impeachment during the cross-examination. It was reversible error for the trial court to defer the introduction of the document until the end of the trial, when its impact on the jury would be lost.

## V.

## The Trial Court Erroneously Admitted Evidence of Appellant's Confidential Communications to His Wife.

The trial court allowed witness Ramona Wolf to testify what she observed the appellant say to prisoner Gaither in her presence. At the time the witness was married to the appellant. Appellant objected that anything said by the appellant in his dealings with Gaither—if they were incriminating as to the appellant—was a confidential communication [R. 209-214]. Apparently the trial court deemed her position as an employee of the police department of North Las Vegas sufficient basis to render her competent as a witness against the appellant.

We respectfully submit that, although there is no precedent directly in point, this was a very unusual situation which required the court to respect the husband-wife confidential communication privilege.[11] Assuming, *arguendo* that the appellant talked or acted in a manner which is later used in a criminal proceeding to convict him of beating a prisoner, then it logically follows that he would not have done so in front of a witness in the police station, unless that witness was his wife whom he believed would not breach the confidence inherent in such a communication. In short, the only reason witness Wofe would have had anything to testify against the appellant was that she heard and saw matters which would have naturally been concealed from her except that she was the appellant's wife. Under these circumstances she was not a competent witness.

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[11] *Blau v. United States* (1951), 340 U. S. 332, 95 L. Ed. 306; *Pereira v. United States,* 347 U. S. 1, 98 L. Ed. 435, 74 S. Ct. 358.

## VI.

## The Trial Court Erroneously Amended the Indictment to Eliminate the Requirement That the Prosecution Prove That Appellant Procured a Confession by Force and Violence.

Section 242 of Title 18, United States Code, in its pertinent portion, applies to a defendant who

> ". . . under color of law, statute, ordinance, regulation or custom, wilfully subjects any inhabitant of any State, Territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. . . ."

Applied to the instant case, *the offense would consist in the fact of the "wilful deprivation under color of State law of rights secured to prisoners by the Federal Constitution."* (*United States v. Walker* (5th Cir.), 216 F. 2d 683, cert. den., 348 U. S. 959, 75 S. Ct. 450, 99 L. Ed. 748.)

In *United States v. Jones* (5th Cir.), 207 F. 2d 785, 787, the Court stated:

> ". . . a plea of not guilty by the defendant will join issue upon, and put the Government to the proof of, all the material allegations in the information, including the willful character of the acts of the defendant and his intention to deprive said prisoners of their civil rights under the constitution and laws of the United States."

It is therefore imperative to determine the material allegations of the indictment in the instant case and in that manner gauge the burden of proof imposed on the Government by the defendant's plea of not guilty.

The indictment clearly sets forth that the prisoner in Count 1, Ray Lewis Sage, Jr., and the prisoner in Count 2, Coite Martin Gaither, Jr., were respectively inhabitants of a State of the United States. It sets forth that the action taken was done pursuant to the color of the State law of the State of Nevada. Both allegations were essential elements of the crime denounced by Section 242.

The indictment further sets forth the rights, privileges or immunities secured or protected by the Constitution of the United States, of which the respective prisoners were wilfully deprived. The rights are specified as follows:

> "(1) The right and privilege to be secure in his person while in the custody of anyone acting under color of the laws of the State of Nevada,
>
> "(2) The right and privilege to be immune from force and violence by anyone exercising the authority of the State of Nevada or acting under color of its laws *for the purpose of obtaining a confession, statement, or information about an alleged offense,* and
>
> "(3) The right and privilege to be tried for an alleged offense by due process of law and if found guilty to be sentenced and punished in accordance with the laws of the State of Nevada, and not to be subjected to illegal punishment, force and violence by any person acting under color of the laws of the State of Nevada." (Emphasis supplied.)

It was further charged in the indictment that appellant, while acting under color of Nevada law (in Count One), did beat with a flashlight, fists and elbows, and did kick with his feet the said Ray Lewis Sage, Jr., "all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid" and (in Count Two)

did beat with fists and elbows, and did kick with his feet the said Coite Martin Gaither, Jr., "all for the purpose and with the intent of depriving him of the Constitutional rights aforesaid."

It is respectfully submitted that the indictment must be construed in such a manner as to require the Government to prove that the appellant extorted a confession, statement or information about an alleged offense by the use of force and violence (See Argument III(C)).

Absolutely nothing in the evidence or the trial court's instructions to the jury showed that the appellant procured a confession, statement or information about an alleged offense by the use of force and violence. By specifying the Constitutional rights by the use of the conjunctive "and," the indictment made the deprivation of each of the three Constitutional rights a material element of the charge.

The Government is precluded from striking out so essential an element of the indictment for it would result in the charge of a different offense than that found by the grand jury It is an unqualified rule that an amendment to an indictment returned by the grand jury is in violation of the Fifth Amendment. (*Ex parte Bain* (1886), 121 U. S. 1, 7 S. Ct. 781, 30 L. Ed. 849; *Stewart v. United States* (9th Cir., 1926), 12 F. 2d 524; *Dodge v. United States* (2d Cir., 1919), 258 Fed. 300, cert. den., 250 U. S. 660, 40 S. Ct. 10, 63 L. Ed. 1194; *Heald v. United States* (10th Cir., 1949), 177 F. 2d 781.)

## VII.

## The Trial Court Erred in Refusing Appellant's Motion for a New Trial.

Appellant's motion for a new trial included in its grounds all the errors of law which are discussed hereinabove and to which exception was duly taken [R. 280-299].

## Conclusion.

For the reasons stated, the judgment of guilty as to appellant should be reversed and the cause remanded for a new trial.

Respectfully submitted,

MORTON GALANE,

*Attorney for Appellant.*

# APPENDIX.

## TABLE OF EXHIBITS.

| tiff | Description | Page of Record Identified | Offered | Received or Rejected |
|---|---|---|---|---|
| | 2 pp. from Minute Book of No. L. V. | 39 | 39 | 40 |
| | (Ident)—2 pp. from Minute Book Sept. 4 (withdrawn) | 41 | 41 | (Withdrawn) 42 |
| | Oath of office re Clifton | 42 | 42 | 42 |
| | Payroll record NLV re Clifton | 43 | 44 | 44 |
| | Booking sheet for Sage | 46 | 47 | 47 |
| | " " " Clifton | 47 | 47 | 48 |
| | Rosa de Lima Hosp. record re Sage | 74 | 75 | 75 |
| | Booking form from Henderson of Ray Sage | 119 | 120 | 120 |
| | Ref. Card from Henderson police department | 120 | 120 | 121 |
| | Photographs | 123 | 192 | 192 |
| | Photographs | 124 | 192 | 192 |
| | " | 124 | 192 | 192 |
| | " | 124 | 192 | 192 |
| | " | 124 | (Not offered) | |
| | " | 125 | 192 | 192 |
| | " | 125 | 192 | 192 |
| | " | 125 | 192 | 192 |
| | " | 125 | (Not offered) | |
| | " | 125 | 192 | 192 |
| | " | 126 | 192 | 192 |
| | " | 126 | 192 | 192 |
| | " | 126 | 192 | 192 |
| | " | 126 | 192 | 192 |
| | " | 126 | 192 | 192 |
| | " | 127 | 192 | 192 |
| | Colored slides of Sage | 216 | 217 | 218 |
| | Black & White film of Sage | 218 | 219 | 219 |
| | " " " " " " | 218 | 219 | 219 |
| endant | | | | |
| | Statement made by Sage at Henderson | 95 | 97 | 97 |
| | Statement made by Sage at NLV police station | 98, 270 | 99, 270 | (Withheld ruling), 270 |
| | Signed statement by Carlson (Ident) | 197 | 200, 274 | 203 (rejected), 275 (received) |
| | Signed statement by Carlson | 199 | 200 | 203 |
| | Log records North L.V. | 252 | 252 | 253 |